



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

#### **Surface Transportation Project Delivery Program; Alaska Department of Transportation and Public Facilities Third Audit Report**

**[FHWA Docket No. FHWA-2020-0014]**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) and related environmental authorities for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first four years of State participation to ensure compliance with program requirements. This notice announces the availability of the third audit report for the Alaska Department of Transportation and Public Facilities (DOT&PF).

**FOR FURTHER INFORMATION CONTACT:** Mr. David T. Williams, Office of Project Development and Environmental Review, (202) 366-5074, [David.Williams@dot.gov](mailto:David.Williams@dot.gov), or Mr. Patrick Smith, Office of the Chief Counsel, 202-366-1345, [Patrick.C.Smith@dot.gov](mailto:Patrick.C.Smith@dot.gov); Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

## **Electronic Access**

An electronic copy of this notice and the final audit report may be downloaded from the specific docket page at [www.regulations.gov](http://www.regulations.gov), from the Office of the Federal Register's Website at [www.FederalRegister.gov](http://www.FederalRegister.gov), or from the Government Publishing Office's Website at [www.GovInfo.gov](http://www.GovInfo.gov).

## **Background**

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The DOT&PF published its application for NEPA assignment on May 1, 2016, and made it available for public comment for 30 days. After considering public comments, DOT&PF submitted its application to FHWA on July 12, 2016. The application served as the basis for developing a memorandum of understanding (MOU) that identified the responsibilities and obligations that DOT&PF would assume. The FHWA published a notice of the draft MOU in the Federal Register on August 25, 2017 (82 FR 40625), with a 30-day comment period to solicit the views of the public and Federal Agencies. After the close of the comment period, FHWA and DOT&PF considered comments and proceeded to execute the MOU. Effective November 13, 2017, DOT&PF assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth year, monitor compliance. FHWA must make the results of each audit available for public comment. FHWA published a notice in the Federal Register for

a draft audit report on December 7, 2020 (85 FR 78914), soliciting comments for 30 days pursuant to 23 U.S.C. 327(g). FHWA received comments on the draft audit report from the American Road & Transportation Builders Association (ARTBA). The ARTBA's comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to the audit. The team has considered these comments in finalizing this audit report. This notice makes available the final audit report of DOT&PF's third audit under the program. The final audit report is available for download at [www.regulations.gov](http://www.regulations.gov) under [FHWA Docket No. FHWA-2020-0014].

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23

U.S.C 327; 23 CFR part 773.

**Stephanie Pollack,**  
*Deputy Administrator,*  
*Federal Highway Administration.*

**Surface Transportation Project Delivery Program, FHWA's Audit of the Alaska Department of Transportation**  
**April 6-10, 2020**

**Executive Summary**

This report summarizes the results of the Federal Highway Administration's (FHWA) third audit of the Alaska Department of Transportation and Public Facilities' (DOT&PF) assumption of FHWA's project-level National Environmental Policy Act (NEPA) responsibilities and obligations pursuant to a 23 U.S.C. 327 Memorandum of Understanding (MOU). The DOT&PF entered the NEPA Assignment Program after more than 8 years of experience making FHWA NEPA Categorical Exclusion (CE) determinations pursuant to 23 U.S.C. 326 (beginning September 22, 2009).

Alaska's MOU became effective on November 13, 2017. Currently, FHWA's NEPA responsibilities in Alaska include the oversight and auditing of the DOT&PF's execution of the NEPA Assignment Program and certain activities excluded from the MOU, such as the NEPA reviews of projects advanced by direct recipients other than the DOT&PF.

The FHWA audit team began to prepare for a site visit in November 2019. The audit team reviewed DOT&PF's NEPA project files, DOT&PF's response to FHWA's pre-audit information request (PAIR), and considered DOT&PF's Self-Assessment Report. On April 6-10, 2020, the audit team conducted a completely virtual site visit rather than its traditional in-person site visit due to COVID-19 pandemic travel restrictions.

The audit team appreciates DOT&PF's responsiveness to questions regarding the status of general observations from the second audit. This third audit report concludes with a status update for FHWA's observations from the second audit report.

The audit team finds DOT&PF in substantial compliance with the terms of the MOU in meeting the responsibilities it has assumed. This report does not identify any non-compliance observations; it does identify two general observations and three successful practices.

**Background**

The NEPA Assignment Program allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance for highway projects. This program is codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities for NEPA project decisionmaking, the State becomes solely responsible and solely liable for carrying out these obligations in lieu of and without further NEPA-related approval by FHWA.

The FHWA assigned responsibility for making project NEPA approvals and other related environmental decisions for highway projects to DOT&PF through an MOU on November 13, 2017. The MOU documents these responsibilities. Examples of responsibilities DOT&PF has assumed in addition to NEPA include Section 7 consultation under the Endangered Species Act and consultation under Section 106 of the National Historic Preservation Act.

This is the third of four required annual audits pursuant to 23 U.S.C. 327(g) and Part 11 of the MOU. FHWA uses audits as the primary mechanism to oversee DOT&PF's

compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating DOT&PF's progress toward achieving the performance measures identified in Section 10.2 of the MOU, and collecting information needed for the Secretary's annual report to Congress. FHWA must present its audit results in a report and make it available for public comment in the *Federal Register*.

The audit team included NEPA subject matter experts from the FHWA Alaska Division Office, the Chief Counsel's Office, the Resource Center, and the Headquarters Offices of Project Development & Environmental Review and Infrastructure.

## **Scope and Methodology**

The audit team examined a sample of DOT&PF's NEPA project files, DOT&PF responses to the PAIR, and DOT&PF's Self-Assessment Report. The audit team also interviewed resource agencies and DOT&PF staff and reviewed DOT&PF policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: Program Management, Documentation and Records Management, Quality Assurance/Quality Control (QA/QC), Training, Performance Measures, and Legal Sufficiency.

Project File Review: To consider DOT&PF staff adherence to program procedures and Federal requirements, the audit team selected a sample of individual project files for which the environmental review had been completed. The audit team evaluated DOT&PF's compliance with assumed responsibilities and adherence to their own processes and procedures for project-level environmental decision-making. The audit team did not evaluate DOT&PF's project-specific decisions. The 54 sampled files included programmatic CEs (actions approved in the regional offices as noted in DOT&PF's November 2017 NEPA Assignment Categorical Exclusion guidance), CEs, Environmental Assessments (approved in the Statewide Environmental Office (SEO)), and re-evaluations (approved by the same office as the original environmental document).

PAIR Review: The audit team reviewed DOT&PF's responses to the PAIR, which consisted of 32 questions about specific elements in the MOU that DOT&PF must implement. The audit team used these responses to develop specific follow-up questions for interviews with DOT&PF staff.

DOT&PF Self-Assessment Review: The audit team reviewed DOT&PF's January 2020 Self-Assessment Report and used it to develop specific follow-up questions for interviews with DOT&PF staff. The NEPA Assignment Program MOU Section 8.2.5 requires the DOT&PF to conduct annual self-assessments of its QA/QC procedures and performance.

Interviews: The audit team conducted 21 interviews with DOT&PF staff. Interviewees included staff from each of DOT&PF's three regional offices and its SEO. The audit team invited DOT&PF staff and middle management to participate in interviews to ensure they represented a diverse range of staff expertise, experience, and program responsibility.

In addition, the audit team conducted two phone interviews of attorneys with the Alaska Department of Law and five phone interviews with staff at the U.S. Army Corps of Engineers (USACE) and the National Marine Fisheries Service (NMFS).

Policy/Guidance/Manual Review: Throughout the document reviews and interviews, the audit team verified information on DOT&PF's NEPA Assignment Program including DOT&PF policies, guidance, manuals, and reports. This included the Environmental Program Manual (EPM), the NEPA Assignment QA/QC Plan, the NEPA Assignment Program Training Plan, and the NEPA Assignment Self-Assessment Report.

## **Overall Audit Opinion**

This report identifies two observations and three successful practices. The audit team finds DOT&PF is substantially in compliance with the provisions of the MOU, has carried out the environmental responsibilities it assumed through the NEPA Assignment Program, and has taken steps to address observations identified in the second audit.

### *Non-Compliance Observations*

The audit team did not make any non-compliance observations in the third audit.

## **Observations and Successful Practices**

This section summarizes the audit team's observations of DOT&PF's NEPA Assignment Program implementation, and DOT&PF's successful practices. "Observations" are items the audit team would like to draw DOT&PF's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The DOT&PF may have already taken steps to address or improve upon the audit team's observations, but at the time of the audit they appeared to be areas where DOT&PF could make improvements. "Successful practices" are positive results that FHWA would like to commend DOT&PF on developing. These may include ideas or concepts that DOT&PF has planned but not yet implemented. Successful practices and observations are described under the six MOU topic areas: Program Management, Documentation and Records Management, QA/QC, Training, Performance Measures, and Legal Sufficiency.

This audit report provides an opportunity for DOT&PF to take further actions to improve their program. The FHWA will consider the status of areas identified for potential improvement in this audit's observations as part of the scope of the fourth audit. The fourth audit report will include a summary discussion that describes progress since this audit.

## **Program Management**

Program Management includes the overall administration of the NEPA Assignment Program. The audit team noted the following successful practices and observations related to program management.

### Successful Practice #1: Consultation with Resource Agencies

The review team interviewed five staff from USACE and three staff from NMFS. Under Section 3.2.1 of the MOU, the State assumed DOT Secretary's responsibilities for highway projects under NEPA for environmental review, reevaluation, consultation, or other actions required under the Endangered Species Act, the Clean Water Act, and other environmental laws. The audit teams' assessment of DOT&PF's compliance with

consultation and permitting requirements under this section of the MOU resulted in the following five conclusions:

1. DOT&PF is submitting complete and accurate information to both the USACE and NMFS for consultation and permitting requirements.
2. DOT&PF is very responsive when agencies request additional information or revisions.
3. DOT&PF submits comprehensive and timely monitoring reports when they are required for projects.
4. DOT&PF has improved their oversight of construction contractors' adherence to USACE permit conditions. The DOT&PF has self-reported permit violations and worked with USACE to remedy the situation.
5. DOT&PF has a good working relationship with USACE and NMFS. Some of the DOT&PF regions have set up regular meetings with the agencies to foster relationships and enhance communication. Resource agency interviews revealed that they think those meetings are helpful and would like them to continue.

The USACE interviews identified an opportunity to increase the efficiency of interagency coordination. The DOT&PF should more clearly identify in the permitting package whether a project is a Federal undertaking or not, and identify what coordination it has completed.

#### Observation #1: Self-Assessment Procedures

Section 8.2.5 of the MOU (Monitoring and Oversight), requires DOT&PF to perform annual self-assessments of its QA/QC process and performance to determine if the process is working as intended. Section 10.1.3 of the MOU (Performance Measurement) requires DOT&PF to collect and maintain data related to the attainment of performance measures, monitor progress towards meeting performance measures, and include its progress in a self-assessment. The DOT&PF's 2018 NEPA Assignment Program Self-Assessment Procedures require that SEO develop the preliminary and final self-assessment report through coordination with, and input from, the Regional Environmental Managers. The audit team found that DOT&PF did not develop the January 2020 Self-Assessment Report in accordance with their procedures, and did not distribute the final report to the regions. The audit team based this finding on interviews.

#### **Documentation and Records Management**

Documentation and Records Management includes maintaining project files and other recordkeeping (whether hardcopy or electronic) pertaining to DOT&PF's discharge of the responsibilities it has assumed under the 23 U.S.C. 327 Program. From November 1, 2018, through October 31, 2019, DOT&PF made 287 project decisions. Through employing both random and judgmental sampling procedures, the audit team identified 54 project decisions to review, and did not identify any systemic issues warranting an observation.



## **Quality Assurance/Quality Control**

Under Section 8.2.4 of the MOU, DOT&PF agreed to carry out regular QA/QC activities in accordance with the MOU and DOT&PF procedures established to implement the NEPA Assignment Program. Based on the information evaluated by the audit team, DOT&PF is conducting regular QA/QC activities in accordance with the MOU, though opportunities exist to utilize trend data to continue improving the program.

## **Training**

Under Sections 12.1 and 12.2 of the MOU, DOT&PF committed to implementing training necessary to carry out the environmental responsibilities assumed under the NEPA Assignment Program. The DOT&PF also committed to assessing its need for training, developing a training plan, and updating the training plan on an annual basis.

### **Successful Practice #2: Central Region Organizational Cross-training Initiative**

The Central Region has recently kicked off an organizational cross-training initiative, called “Share-The-Knowledge,” that provides opportunities for environmental analysts to get exposure to informal training in other functional areas, such as transportation planning, realty, safety, highway design, operations, and construction. Cross-training provides a general awareness of how and to what extent NEPA reviews can relate to project planning and inform Federal-aid highway project development.

### **Successful Practice #3: Taking Advantage of Training Opportunities**

Based on interviews, the audit team learned the South Coast Region invited Federal resource agency representatives to monthly meetings to encourage knowledge sharing and partnering. During a time when training budgets are limited, FHWA encourages DOT&PF to continue to take advantage of training opportunities that may be made available by Federal partners. One example was when DOT&PF staff participated in the recent NMFS acoustic training in Anchorage.

## **Performance Measures**

The DOT&PF continues to collect, maintain, and develop data towards monitoring its performance as required by Section 10.1.3 of the MOU. The audit team noted the following observation related to Performance Measures.

### **Observation #2: Assessing Resource Agency Communication**

Section 10.2.1 C. of the MOU requires DOT&PF to “Assess change in communication among DOT&PF, Federal and State agencies, and the public resulting from assumption of responsibilities under this MOU.” The MOU allows DOT&PF to determine the method it will use to assess this change. The DOT&PF selected to use an annual resource agency poll. The DOT&PF identified this measure in its *DOT&PF NEPA Assignment Program Performance Measures* document located on its Website. In addition, DOT&PF reported in this audit, and Audits 1 and 2, that an annual resource poll would be the method for collecting data towards monitoring this measure. The DOT&PF has not used a resource agency poll to date. Through the audit team’s review of DOT&PF’s Self-Assessment, PAIR, and audit interviews with DOT&PF, the audit team

found that a poll was not a useful tool to assess changes in communication. The FHWA recommends that DOT&PF consider changing the method for reporting this measure.

### **Legal Sufficiency**

Since 2017, the same attorney from the Department of Law (DOL), Transportation Section, has been assigned to the NEPA Assignment Program. The assigned attorney has significant experience with Federal-aid highway projects and the Federal environmental process. The attorney works directly with DOT&PF staff on project environmental documents. Based on the interviews, the review process exceeded the standard set forth in the Environmental Procedures Manual, with the attorney being involved early in project development, normally reviewing a NEPA document before receiving a formal request for a legal sufficiency review. During the audit period, the attorney reviewed one Final Section 4(f) Evaluation and issued a finding of legal sufficiency in August 2019. The attorney did not review an environmental impact statement during the audit period.

The DOL management stated during the interviews that while one attorney is currently assigned to the program, should workload increase significantly another attorney would be assigned to NEPA work, perhaps through the utilization of outside counsel per 23 U.S.C. 327(a)(2)(G).

Based on these observations, the audit team finds that the DOT&PF meets the legal sufficiency determination and staffing requirements set forth in the DOT&PF Environmental Procedures Manual.

### **Status of Observations from Audit #2 Report (April 2019)**

This section describes the actions DOT&PF has taken (or is taking) in response to observations made during the second audit.

#### **Observation #1: Applicability of Existing Interagency Agreements**

Section 5.1.3 of the MOU required the DOT&PF to work with FHWA and the resource agencies to modify existing interagency agreements within 6 months of the effective date of the MOU. During Audit 2, the audit team determined that none of DOT&PF's existing agreements applied to the current NEPA Assignment Program under 23 U.S.C. 327. According to the January 2020 Self-Assessment Report, "DOT&PF is not currently pursuing agency agreements per Section 5.1.4 of the MOU regarding appropriate processes and procedures."

#### **Observation #2: DOT&PF Delegation of Authority for NEPA Approvals**

Section 3.3.1 of the MOU requires DOT&PF to make NEPA approvals (CE determinations, findings of no significant impact, or records of decision). Audit 2 revealed inconsistencies regarding the delegation of NEPA approvals within DOT&PF. The DOT&PF's January 2020 Self-Assessment states that DOT&PF will incorporate a protocol that standardizes the delegation authority for NEPA approval in the regions in the February 2020 update of its EPM. The DOT&PF has not made any changes to the EPM since February 2018 per the DOT&PF's response to Audit 3's Pre-Audit Information Request. In interviews conducted as part of Audit 3, DOT&PF relayed plans to incorporate this protocol into the EPM in May 2020. Currently, each region has its

own delegation process. Generally, DOT&PF delegates NEPA approvals to the senior staff and communicates that delegation via email to affected parties. Most staff interviewed understand their region's delegation process and new staff are becoming oriented with the process.

#### Observation #3: Staff Capacity

Sections 4.2.1 and 4.2.2 of the MOU outline the requirements for the State's commitment of resources and adequate organizational staff capacity. Moderate to high staff turnover has been a recurring issue since the MOU went into effect (Audit #1 report Observation #3 and Audit #2 report Observation #3). According to the January 2020 Self-Assessment Report, "DOT&PF's staffing levels were a concern during this audit period and senior staff expended considerable effort to hire new qualified staff and to retain current staff. As a result of this effort, the regional offices are now fully or near fully staffed." DOT&PF is aware of the issue and continues to track staffing impacts on the NEPA Assignment Program through the QA/QC process.

#### Observation #4: Documentation of Environmental Commitments

Section 5.1.1 of the MOU requires the State to follow Federal laws, regulations, policies, and procedures to implement the responsibilities assumed. Audit 2 revealed inconsistencies regarding how DOT&PF was documenting environmental commitments and making sure that DOT&PF carries the environmental commitments through the project development process and into construction. The DOT&PF developed written guidance on the documentation of environmental commitments. According to the January 2020 Self-Assessment Report, the guidance was implemented on May 5, 2019. Based on the interviews conducted as part of Audit 3, DOT&PF staff understood who certified that the environmental commitments were included in the plan, specifications, and estimates, as well as their role in the certification process.

#### Observation #5: Inconsistency in Project Termini and Statewide Transportation Improvement Program (STIP)

Section 3.3.1 of the MOU requires DOT&PF, at the time of NEPA approval (CE determination, finding of no significant impact, or record of decision), to ensure that the project's design concept, scope, and funding is consistent with current planning documents. During Audit 2, the audit team found one project file with an inconsistency between project termini shown in a project plan and that described in the STIP, and similar inconsistencies in the DOT&PF's Audit 2 Self-assessment. Project scope inconsistencies were not found by the file review team during Audit 3. The DOT&PF's Audit 3 Self-assessment identified one instance of a project description discrepancy that did not affect the scope of the project. Regional QC efforts appear to have improved this issue, although DOT&PF noted in their self-assessment that using the STIP project description as the project scope in environmental documents is not possible for all projects.

#### Observation #6: Training Plan Update

Section 12.2 of the MOU commits DOT&PF and FHWA to update the DOT&PF training plan annually in consultation with other Federal Agencies as appropriate. The DOT&PF did not update its Training Plan prior to or during the Audit 2 process. In their response

to the Audit 3 PAIR, DOT&PF stated “the training plan was updated on October 29, 2019, with minor revisions to Section 5. A list of proposed training has been added to this section and the RD&T2 [Research, Development, and Technology Transfer], FHWA, and Prior Training Requests subsections have been removed.” Based on the information gathered through the PAIR and interviews, the audit team is satisfied that the DOT&PF addressed the training observation from the second audit. Moving forward, DOT&PF committed to coordinating with the FHWA Alaska Division Office and other Federal Agencies, as appropriate, for the future annual updates of the training plan.

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